

## BOOTH SWEET LLP

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April 30, 2015

Bear Wilner-Nugent  
620 SW 5th Avenue, Suite 1008  
Portland, OR 97204

**Re: *Schwern v. Plunkett*, Case No. 3:14-cv-00146-PK (D. Or.)**

**Sent via email to [bwnlaw@gmail.com](mailto:bwnlaw@gmail.com)**

Dear Mr. Wilner-Nugent:

I write in response to your letter to Nóirín Plunkett dated April 8, 2015 and your April 22, 2015 email to me regarding the above-referenced action. Your April 8 letter stated your intent to file your Plaintiff's Motion for Sanctions Against Defendant ("Motion") 21 days thereafter; your email stated that you would not extend the time for filing your Motion past May 4, unless Plunkett withdrew her Ninth Circuit appeal.

I will caution you that your Motion is wholly unfounded. Filing it would be completely improper, directly violating the court-ordered stay of proceedings and contravening the purpose of the Oregon anti-SLAPP statute, ORS 31.150 *et seq.*, and would leave both you and Mr. Schwern subject to sanctions.

On July 15, 2014, Plunkett moved for a stay pursuant to both Fed. R. App. P. 8(1)(A) and ORS 31.152(2). See Doc. 29 p. 1. On August 15, 2014, pending the Ninth Circuit's resolution of the appeal of Plunkett's anti-SLAPP special motion to strike, the Court ordered a stay of not just discovery, but of all proceedings. Doc. 38. The Court found that "Plunkett's motion for stay of these proceedings is well taken." *Id.* p. 3. As the Court noted, the Ninth Circuit allowed Plunkett's appeal to proceed without requiring a Rule 54(b) certification that the Court's order denying the anti-SLAPP motion was final and appealable. *Id.* Therefore, the Court reasoned, Plunkett's right to appeal "would necessarily stem from adoption of her plausible interpretation of the statute as providing immunity from suit rather than (mere) defense against liability." *Id.* Your motion puts that immunity under attack. "[I]t would entirely defeat the purpose of the statute to permit this action to proceed pending the outcome of Plunkett's appeal, in that even if Plunkett were ultimately entirely successful before the Ninth Circuit, absent a stay of trial-court proceedings she would still have been subjected to the necessity of litigating claims from which she presumptively should have been granted complete immunity." *Id.* In the interim, the only filings permitted in the Court are joint status reports every 120 days and notice of any material developments in connection with the appeal. *Id.* p. 4.

Your Motion offers no valid basis for violating the stay or from further encroachments on Plunkett's immunity from suit. Pursuant to ORS 31.152(3), Plunkett would seek reimbursement of any fees and

costs incurred in fighting this end-run around the statute, in addition to the fees and costs already demanded based on the motion to strike. See Doc. 4 p. 2. A prevailing anti-SLAPP defendant's entitlement to reasonable attorney's fees and costs is not limited to those incurred in relation to the motion to strike. See *Schumacher v. City of Portland*, CV-07-601-MO, 2008 U.S. Dist. LEXIS 5443 at \*9, 2008 WL 219603 at \*4 (D. Or. Jan. 23, 2008). Moreover, because your Motion would serve no purpose but to ratchet up costs for all parties without basis, it would itself be sanctionable under Fed. R. Civ. P. 11 and 28 U.S.C. § 1927.

The Motion argues that Plunkett should be sanctioned for stating, in a declaration filed with the Court, the well-founded belief that Mr. Schwern sent six white roses to Plunkett for delivery on January 27, 2014, which was both Plunkett's birthday and the date you filed this lawsuit on Mr. Schwern's behalf. Doc. 6 ¶ 10 & Exh. 3. Your Motion's Facts section enumerates seven supposed "reasons why these files establish that defendant or someone acting on her behalf, not plaintiff, placed the TaskRabbit order for the rose delivery." Motion pp. 5-6. Setting aside the issue of the admissibility of the TaskRabbit files in question, which you obtained in connection with a separate proceeding involving the abuse prevention order imposed on Mr. Schwern, *id.* pp. 4-5, those files offer no support for your concocted argument.

Simply, your Motion simply fails to allege any fact that contradicts Plunkett's declaration. The seven "reasons" you cite suggest only that the person who ordered the roses sought to conceal his identity (by using a disposable email address, prepaid debit card, and TOR server), and knew Plunkett's name and contact information (name, phone number, street address, and zip code). That is fully consistent with, and lends credence to, Plunkett's declared belief that Mr. Schwern ordered the roses. He had ample reason to conceal his identity when ordering the roses, because the abuse prevention order barred him contacting Plunkett by any means, directly or indirectly. See Doc. 6 p. 6. He surely had the knowhow, as a declared "open source computer software expert." Complaint ¶ 1. He knew Plunkett's name and phone number, which had not changed throughout their relationship. And Mr. Schwern well knew Plunkett's Massachusetts address, though you falsely claim that "Defendant has never presented any evidence tending to establish how plaintiff could have learned" it. Motion p. 5. The abuse prevention order listed that address, as needed to inform Mr. Schwern which residence he was required to avoid. Doc. 6 p. 6. He knew the address well before January 2014; his attorney appeared to contest the order's extension on December 12, 2013. *Id.* p. 7 ("Def atty appeared").

That abuse prevention order further gives the lie to your spurious Motion, which is founded on the implausible conspiracy theory that in January 2014, Plunkett saw fit to engineer the rose delivery to herself. without once suggesting a motive for doing so. Mr. Schwern lived across the country in Portland, Oregon, and the abuse prevention order had already been extended through December 12, 2014. Doc. 6 p. 7. Why would Plunkett go to the trouble? According to the Motion, the TaskRabbit account was created on January 24, 2014. Motion p. 5. Plunkett could not then have anticipated what Mr. Schwern had planned. Unbeknownst to Plunkett, he had arranged with you to file this lawsuit against his ex-wife three days later, on January 27, 2014. Meanwhile, TaskRabbit identified the person who placed the order as "Michael S." Doc. 6 p. 9. Nothing in your Motion, or your conspiracy theory, contradicts Plunkett's declared belief that Michael S. was Michael Schwern. The evidence you would proffer for support is instead wholly consistent with Mr. Schwern's pattern of harassment, which stretches back years; this lawsuit, and the Motion, are only the latest chapters.

Further grounds for denying your Motion, and for imposing sanctions on you and your client under Section 1927 and Rule 11 should you be so rash as to file it, are found in the Motion's proposal to reopen discovery, despite the stay, without satisfying the anti-SLAPP statute. Pending resolution of the stay, "the

court, on motion and for good cause shown, may order that specified discovery be conducted notwithstanding the stay.” ORS 31.152(2). The Motion lacks good cause for pursuing discovery, because it only alleges facts consistent with Plunkett’s declaration. It also lacks the required specificity, as it seeks “further proceedings, which could include the examination under oath of defendant and other witnesses.” Motion p. 9. This open-ended request is far broader than permissible. *See Page v. Parsons*, 249 Ore. App. 445, 457, 277 P.3d 609, 616 (Or. Ct. App. 2012) (affirming trial court’s denial of request for “wide-open discovery” pending resolution of anti-SLAPP motion). Once an anti-SLAPP motion is filed, the Oregon legislature gave plaintiffs the burden “to show a need for discovery.” *Id.* Discovery is properly denied when the plaintiff fails to “show good cause, and request with particularity, discovery that may assist Plaintiff in meeting its burden that it will prevail on the claims.” *Id.* Your broad request does not satisfy the anti-SLAPP plaintiff’s burden to narrowly tailor any request to specified discovery needed to prove the claims at issue. Nothing in your Motion would alter the issues before the Ninth Circuit or buttress Mr. Schwern’s frivolous claims on the merits, so it is irrelevant and does not support any need for discovery you may claim.

The Motion’s lack of merit makes its pretextual nature transparent. This is only your latest attempt to circumvent the automatic anti-SLAPP stay on discovery and impose needless burdens on Plunkett. *See* Doc. 9 ¶¶ 11-12; Doc. 15 ¶ 10 (conceding plaintiff would need discovery to prove his allegations); Doc. 36 at 20:11-24 (proposing to subpoena nonparties, depose Plunkett, and seek production from Plunkett). You have all but admitted in open Court that Mr. Schwern is on a fishing expedition. Doc. 36 at 7:13-16 (“plaintiff simply needs some time to do a bit of discovery to see if -- if -- if there’s enough there to make a meritorious claim and move forward, which I think is what this is all about”). Filing suit without first determining whether you have a meritorious claim gets litigation exactly backwards. Doing so without a reasonable inquiry is sanctionable under Rule 11. Pursuing the Motion despite the stay would unreasonably and vexatiously multiply the proceedings in violation of 28 U.S.C. § 1927. This sort of bad-faith litigation is exactly what the anti-SLAPP statute is designed to prevent, and your unfounded conspiracy theory does not support abridging Plunkett’s immunity from all proceedings in this matter.

If you file the Motion regardless, you should expect Plunkett to oppose it, defeat it, and file a motion seeking sanctions against you and Mr. Schwern. “A party defending a Rule 11 motion need not comply with the separate document and safe harbor provisions when counter-requesting sanctions.” *Patelco Credit Union v. Sahni*, 262 F.3d 897, 913 (9th Cir. 2001)). I will not hesitate to protect Plunkett. I hope you come to your senses and spare us all further litigation over your senseless, frivolous Motion.

Thank you for your attention to these issues.

Sincerely,



Dan Booth  
Booth Sweet LLP  
Massachusetts BBO # 672090



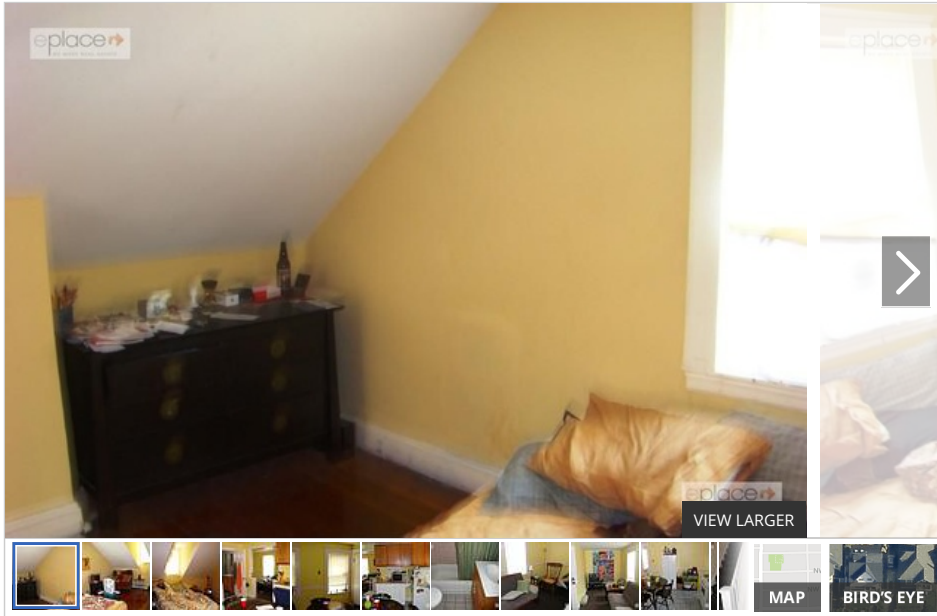
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EXHIBIT B

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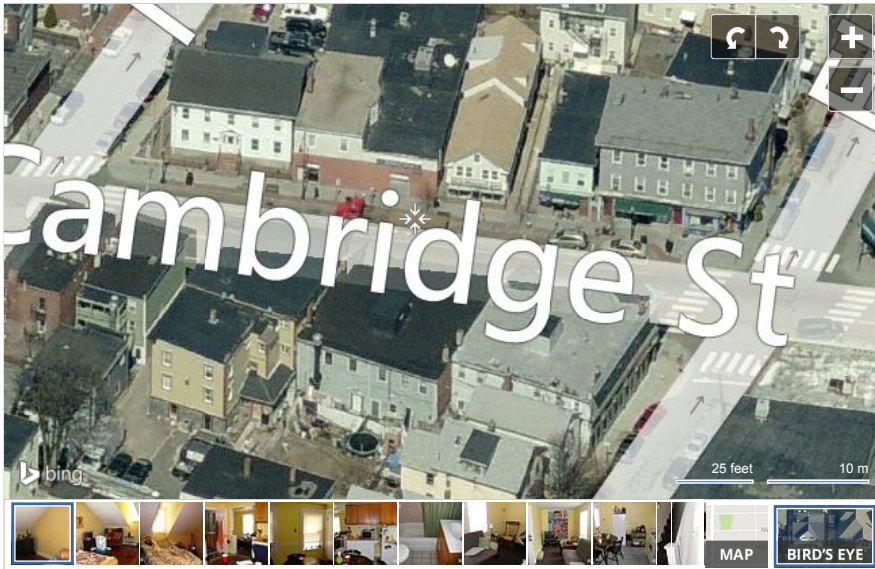
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+\$5,779 Last 30 days

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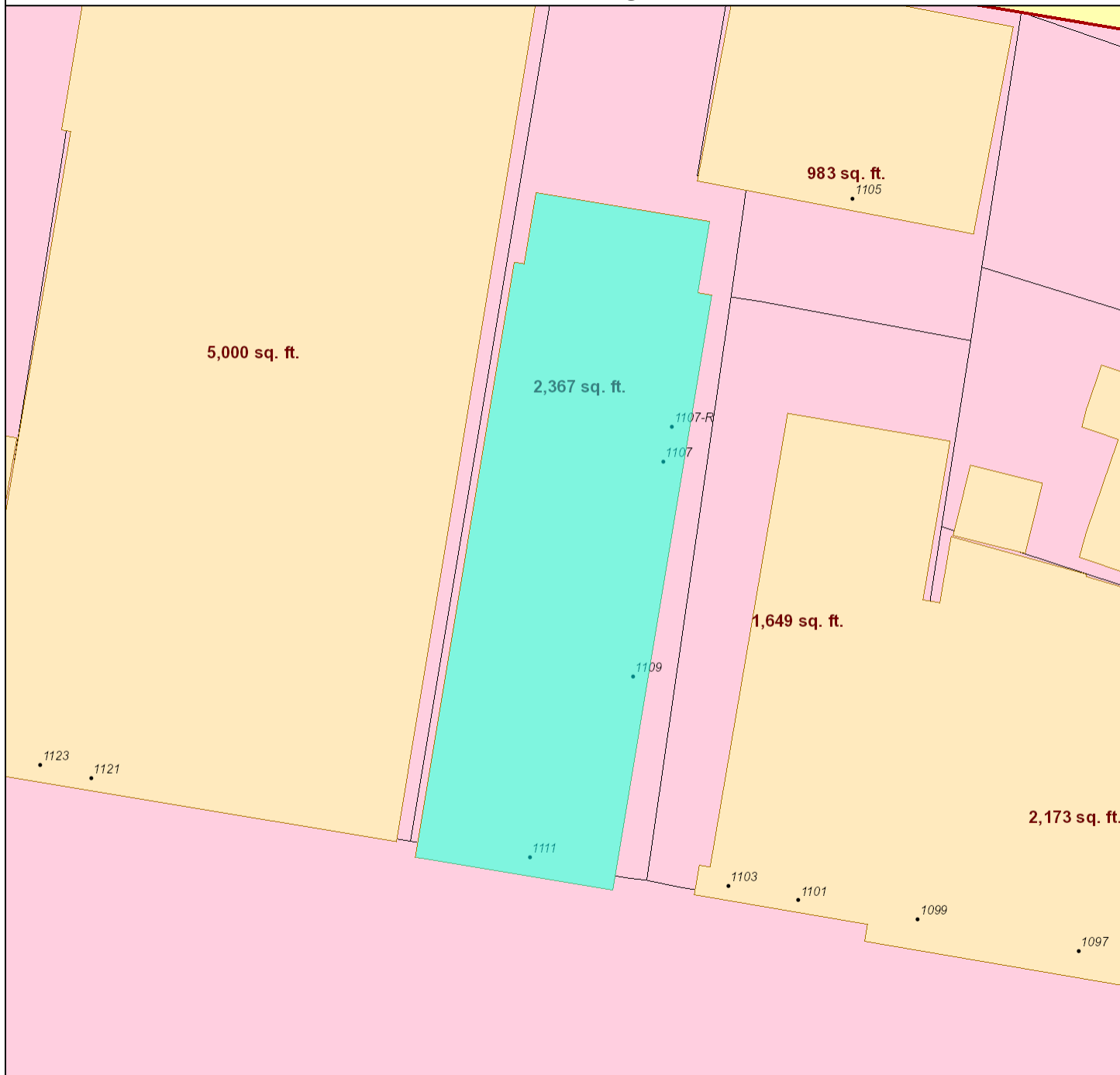
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  - Residence C-1
  - Residence C-1A
  - Residence C-2
  - Residence C-2A
  - Residence C-2B
  - Residence C-3
  - Residence C-3A
  - Residence C-3B
  - Office-1
  - Office-2
  - Office-2A
  - Office-3
  - Office-3A
  - Business A
  - Business A-1
  - Business A-2
  - Business A-3
  - Business B
  - Business-1
  - Business 2
  - Business C
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  - Industry A-2
  - Industry A
  - Industry B-1
  - Industry B-2

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### John Singer Sargent Watercolors

<http://www.mfa.org/exhibitions/john-singer-sargent-watercolors>

The two US museums that own the largest collections of John Singer Sargent's work, the Museum of Fine Arts Boston and the Brooklyn Museum, have collaborated to mount this exhibition of over 90 Sargent watercolors. The accompanying website features a slideshow with 10 paintings, and several short videos. The first painting in the slideshow, *Simplon Pass: Reading*, about 1911, shows two young women dressed in white, lounging outdoors in the shade of their parasols. In one of the videos, art historian Richard Ormond, who is actually John Singer Sargent's great nephew, tells the story of one of the young women depicted, Rose-Marie Ormond, who was his aunt and Sargent's niece. "Meet the Master of Watercolor" is a video introduction to the exhibition with Museum Director Malcolm Rogers and curator Erica Hirshler, while "Learn Sargent's Technique" is a just-over-two-minute demo of Sargent's wet-on-wet painting, by artist Monika de Vries Gohlke. [DS]

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### Center for Pacific Northwest Studies: Photograph Catalog

[http://www.library.wvu.edu/photo\\_cat\\_cpnws](http://www.library.wvu.edu/photo_cat_cpnws)

The Center for Pacific Northwest Studies at Western Washington University brings together a host of scholars fascinated with the change and development in the Pacific Northwest region from the 1850s to the 1960s. With over 6,000 photographs, the collection covers everything from Native American culture and traditions to the Works Progress Administration's legacy in the state. Visitors will find Washington's Whatcom, Skagit, and Island counties quite well documented and first-time users can browse the Photograph Catalog for collections of select photographers and prominent individuals. The Ferd Brady collection contains a wonderful range of activities and cultural events that took place in La Connor, Washington during the 1930s and 1940s. Additionally,